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No. 856

IN THE SUPREME COURT OF THE UNITED STATES

RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

J. LELAND BROWN, et al ..... Petitioners

vs.

PEARL RIVER VALLEY WATER SUPPLY DISTRICT ..... Respondent

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vs.

PEARL RIVER VALLEY WATER SUPPLY DISTRICT ..... Respondent

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

This is a response by the Pearl River Valley Water Supply District to the petition for a writ of certiorari to review the opinion of the Supreme Court of Mississippi rendered October 7, 1963, 156 So. 2d 572, not yet reported in the official State Reports. The arrangement of this brief will follow roughly that of the Petitioners.

JURISDICTION

In order to invoke the jurisdiction of this Court under 28 U.S.C. 1257(3), Petitioners contend, as they must, (1) that they have been deprived of their property in violation of the due process clause of the Fourteenth Amendment; and (2) that the issue of due process was raised at every available stage of both the trial and appeal below.

Jurisdiction to review this decision of the Mississippi Supreme Court is denied by Respondent on these grounds:

(1) The issue of due process under the Fourteenth Amendment is not presented by the record since it was not raised at the trial level, nor presented to the Mississippi Supreme Court on appeal;

(2) The Mississippi Supreme Court did not and was not required to decide a federal question, but rested its decision on applicable state law;

(3) In the alternative, if the due process clause of the Fourteenth Amendment can be considered as having been presented below, the decision of the Mississippi Supreme Court was in accord with applicable decisions of this Court in the field of eminent domain; and

(4) In the field of eminent domain the decision of the Supreme Court of Mississippi is not a final judgment capable of review by this Court.

STATEMENT OF THE CASE

The legislation providing for the creation of the Pearl River Valley Water Supply District was enacted as Chapter 197, General Laws of Mississippi 1958, the short title of which is "The Pearl River Valley Water Supply District Act." Pertinent portions of this act are contained in Appendix A.

Section 2 of the Pearl River Valley Water Supply District Act contains the following legislative determination and declaration of policy:

"*Legislative Determination and Declaration of Policy.* (a) It is hereby declared as a matter of legislative determination, that the waterways and surface waters of the state are among its basic resources, that the overflow and surface waters of the state have not heretofore been conserved to realize their full beneficial use, that the preservation, conservation, storage and

control of such waters are necessary to insure an adequate sanitary water supply at all times, to promote the balanced economic development of the state and to aid in flood control, conservation and development of state forests, irrigation of lands needing irrigation and pollution abatement. It is further determined and declared that the preservation, conservation, storage and control of the waters of the Pearl River and its tributaries and its overflow waters for domestic, municipal, commercial, industrial, agricultural and manufacturing purposes, for recreational uses, for flood control, timber development, irrigation and pollution abatement are, as a matter of public policy, for the general welfare of the entire people of the state.

"(b) That the creation of the Pearl River Valley Water Supply District is determined to be necessary and essential to the accomplishment of the aforesaid purposes and that this Act operates on a subject in which the state at large is interested. All the terms and provisions of this Act are to be liberally construed to effectuate the purposes herein set forth, this being a remedial Act."

In order to organize, the Act provided that the Pearl River Valley Water Commission was to petition the Chancery Court, setting forth the counties to be included, the fact that the contemplated facilities were feasible for water conservation or services contemplated by the declaration of policy, the necessity for the construction of the facilities and a map showing the general location of the reservoir and related facilities (Appendix A—§ 5).

The "project area" was limited to one mile from the shoreline of the reservoir at high water and the term "related facilities" was defined as the facilities indi-

cated on the maps or explained in the pleadings and was to include land within one mile from the high water mark, which would be used in connection within the recreational or industrial development of the project (Appendix A—§ 5).

The Act contained a provision for publication of notice to the property owners apprising them of the petition and the date of the hearing and commanding them to appear and show cause why the District should not be organized (Appendix A—§ 6). Certain designated public officials of the various counties were specifically named as parties defendant.

After compliance with all statutory requirements, the matter of the creation of the District was presented to the Chancery Court, where it was contested by two land owners and others and from a decree creating the District, these land owners appealed to the Supreme Court of Mississippi, the case being reported as *Culley v. Pearl River Industrial Commission*, 234 Miss. 783, 108 So. 2d 390 (1959). The constitutionality of the Pearl River Valley Water Supply District Act was sustained and the District proceeded with the construction of the project.

By 1962 the District had acquired approximately 43,000 acres of a contemplated 46,000 acres (R. 566) considered necessary for the project, when proceedings in eminent domain were instituted to condemn the 34.4 acres of land owned by Petitioners herein.

Petitioners immediately filed a petition for a writ of prohibition pursuant to Section 2782 of the *Miss. Code of 1942 Ann.* and charged:

(1) The application for eminent domain failed to specify a public use or necessity for the land;

(2) The taking of the land would be in violation of the Constitution of the State of Mississippi, the Constitution of the United States and the laws of the State of Mississippi;

(3) There was no public necessity for the taking; and

(4) The taking of 7.6 acres of land for the relocation of the Natchez Trace Parkway was beyond the authority of the District (R. 2-7).

These issues were denied by the District (R. 12-16).

A lengthy trial was held on the issues raised by the pleadings at the conclusion of which the lower court, sitting without a jury, found that 6.8 acres would be needed by the District for the relocation of the Natchez Trace Parkway; 7 acres would be subject to periodic inundation and authorized the condemnation of this approximate 15 acres.

The trial court prohibited the taking of 12.9 acres, ruling that the District was required to show public necessity clearly and without a doubt before homestead property could be taken. (R. 33-38). This result was reached because the trial court erroneously interpreted Section 17(x) of the Act (Appendix A) as requiring a higher degree of necessity before homestead property could be condemned.

The District appealed, and the land owners cross-appealed. Errors assigned to the Supreme Court by the District and cross-assigned by the land owners are set forth in Appendix C.

The Supreme Court of Mississippi decided the case of *Pearl River Valley Water Supply District v. Brown*, 156 So. 2d 572 (Miss. 1963), solely on applicable state law,

no federal issues having been presented. Among others the court held:

(1) That the question of public use of the land within the one-quarter mile perimeter, if utilized for access control, control of pollution and for recreational purposes, was decided in *Cullen v. Pearl River Industrial Commission*, supra, and under the principles of stare decisis would be followed by the Supreme Court of Mississippi in the *Brown* case.

(2) The burden of proof to show a lack of necessity was on the land owner who had failed to meet the burden;

(3) The trial court was in error in requiring the District to show public necessity "clearly without a doubt" and interpreted Section 11(w) of the Act as not being operable until such time as the District determined that land was surplus and unneeded; and

(4) The resolution of taking was not required to include final and detailed plans for the land use.

From this decision the land owners have petitioned the Supreme Court of the United States charging for the first time a violation of the Fourteenth Amendment by the District.

ARGUMENT

POINT A

The Supreme Court of the United States lacks jurisdiction to consider questions not raised before the highest court of a state.

A cursory examination of the record establishes that the question of federal due process under the Fourteenth Amendment was never presented to the trial court, nor to the Mississippi Supreme Court. The initial pleading filed

by the land owners, Petitioners here, to challenge the right of the Pearl River Valley Water Supply District to condemn their lands charged in the vaguest terms that the taking was in violation of "the Constitution of the State of Mississippi, the Constitution of the United States, and the laws of the State of Mississippi" (R. 4, 5). Likewise, the District answered by way of denying these allegations in equally vague language (R. 15). Thus, the Constitution of the United States was alluded to in the most general terms and the Fourteenth Amendment, much less the due process clause, was never even mentioned in the pleadings on which the issues of this case were formed.

The opinion of the trial court (R. 33, 34) makes no reference to the Fourteenth Amendment, and it is obvious that this decision rested solely upon state law. This opinion is set forth as Appendix B.

From the decision of the trial court, the District appealed, and the land owners cross-appealed to the Supreme Court of Mississippi. Nowhere in the Assignments of Error or in the Cross-Assignments of Error to the Mississippi Supreme Court can there be found the most remote inference that either party considered the due process clause of the Fourteenth Amendment as being in any way pertinent to the issues on appeal (R. 758—761) (Appendix C).

Rule 6(2) of the Revised Rules of the Supreme Court of Mississippi provides: "No error not distinctly assigned shall be argued by counsel, except upon request of the Court, but the Court may, at its option, notice a plain error not assigned or distinctly specified." See *Newsom v. Newsom*, 226 Miss. 697, 85 So. 2d 221 (1956). The Mississippi Supreme Court was, therefore, not called upon and did not decide the federal constitutional issue

here assigned. And aside from Rule No. 6(2) of the Revised Rules of the Mississippi Supreme Court, it is fundamental under the appellate practice in Mississippi, as in most courts, including this Court, that constitutional issues not raised in the lower court will not be considered for the first time on appeal. *State v. Cabana Terrace, Inc.*, 153 So. 2d 257 (Miss. 1963); *Comfort v. Landrum*, 52 So. 2d 658 (Miss. 1951); *Adams v. Board of Supervisors of Union County*, 177 Miss. 403, 170 So. 684 (1936).

Further, while it is doubtful that the issue of federal due process could have been raised on the land owners' Suggestion of Error to the Mississippi Supreme Court [which performs the function of a motion for a rehearing], there was no mention of the Federal Constitution or its violation, which is an additional indication that due process under the Fourteenth Amendment was not an issue until the land owners, Petitioners here, began to cast about to find one further forum in which to present their grievances.

This Court has repeatedly held that it is without jurisdiction to review the opinions of the state courts where no federal question was presented for decision.

A case similar in principle to the one at bar is *Wilson v. Cook*, 327 U.S. 474, 483, 90 L. Ed. 793, 801, 66 S. Ct. 663. There the plaintiffs argued for the first time before the Supreme Court of the United States that an Arkansas taxing statute as applied to them was unconstitutional since it placed a forbidden tax on the United States of America. This Court stated:

> "But we are not free to consider these grounds of attack for the reason that they were not presented to the Supreme Court of Arkansas or considered or decided by it. While the constitutional question now

sought to be presented is in some measure related to that decided by the state court, and like it, arises under the implied constitutional immunity of the Federal Government from state taxation, it is not merely 'an enlargement' of an argument made before the state Court, but is so distinct from the question decided by the state court that our decision of the issue raised there would not necessarily decide that now sought to be raised. Compare Dewey v. Des Moines, 173 U.S. 193, 197, 198, 43 L ed 665, 666, 19 S Ct 379. We are therefore not free to consider it.

"'In reviewing the judgment of a state court, this Court will not pass upon any federal question not shown by the record to have been raised in the state court or considered there, whether it be one arising under a different or the same clause in the Constitution with respect to which other questions are properly presented.' New York ex rel. Cohn v. Graves, 300 US 308, 317, 81 L ed 666, 673, 57 S Ct 466, 108 ALR 721, and cases cited. For, as we said in McGoldrick v. Compagnie Generale Transatlantique, 309 US 430, 434, 435, 84 L ed 849, 851, 852, 60 S Ct 670, 'In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that

this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court." . . ."

See also *Herndon v. Georgia*, 295 U.S. 441, 79 L. Ed. 1530, 55 S. Ct. 794; *Newsom v. Smith*, 365 U.S. 604, 5 L. Ed. 2d 803, 81 S. Ct. 774; *Hulbert v. Chicago*, 202 U.S. 275, 50 L. Ed. 1026, 26 S. Ct. 617; *Bloeth v. State of New York*, Opinion of Mr. Justice Harlan March 19, 1962, 7 L. Ed. 2d 780, 82 S. Ct. 661.

It, therefore, follows that since no issue arising under the Fourteenth Amendment was presented at any stage of the proceedings below, this Court lacks jurisdiction to review the decision of the lower court.

POINT B

The decision of the Supreme Court of Mississippi on an appeal from a hearing on a petition for a writ of prohibition to enjoin eminent domain proceedings is not a final judgment capable of review by this Court.

In Mississippi the sole question of the amount of compensation is decided in the Special Eminent Domain Court, after which decision, title passes on the payment of the award. Sections 2749-2782, *Miss. Code of* 1942 *Ann.*; *Erwin v. Mississippi State Highway Commission*, 213 Miss. 885, 58 So. 2d 52 (1952).

The questions of the right to exercise eminent domain, the necessity for the taking and the public use are heard in separate proceedings, either pursuant to Section 2782 of the *Miss. Code of* 1942 *Ann.*; or by a bill for injunction in Chancery Court. *Vinegar Bend Lumber Co. v. Oak Grove & G. R. Co.*, 89 Miss. 84, 43 So. 292, 89 Miss. 117, 43 So. 299 (1907); *Dantzler v. Mississippi State Highway Commission*, 187 Miss. 721, 193 So. 4 (1940).

Primarily, the questions presented to the Supreme Court of Mississippi below concerned only necessity and public use while the question of compensation is yet pending.

In cases presenting almost identical procedural situations, this Court has held that the decisions of state courts resolving questions of public necessity and use are not final judgments when the question of just compensation remains to be decided in further proceedings.

Closely analogous is *Washington ex rel Grays H. L. Co. v. Superior Court*, 243 U.S. 251, 255, 61 L. Ed. 702, 705, 37 S. Ct. 295. There a logging company instituted a proceeding to condemn land for the purpose of maintaining a logging road. The land owners opposed the petition on the grounds that the taking was for a private use and in violation of due process. After a hearing on the question of necessity, the Superior Court entered an order of condemnation and set the case for jury trial to determine the amount of compensation. The land owner appealed to the Supreme Court of Washington for the purpose of reviewing the constitutionality of the act and the right to condemn their property. The decision of the lower court was affirmed. A writ of error was sued out from the Supreme Court of the United States.

The condemnor asserted that the decision of the Supreme Court of Washington was not final; and the landowner responded saying that under the practice of the State of Washington, the judgment was final since after the amount of compensation had been determined, under Washington decisions the sole issue on appeal was the justness of the damages. This Court held:

"[W]e cannot regard a condemnation proceeding taken under the authority of the Constitution of Wash-

ington and the Act of 1913 as severable into two distinct branches. The Constitution forbids that the property be taken without compensation first made or ascertained and paid into court for the owner, and, of course, in case of controversy, compensation cannot be made to the owner until the amount of it has been ascertained. It follows that the judgment entered by the superior court to the effect that petitioner was entitled to condemn and appropriate the land in question for its right of way must be construed as being subject to a condition that the proper compensation be first ascertained and paid.

"As we read the decisions of the supreme court of the state, such judgments are not interpreted in any other sense; they are not described as final, nor as independent judgments . . ."

See also *Catlin v. U. S.*, 324 U.S. 229, 89 L. Ed. 911, 65 S. Ct. 631; *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 92 L. Ed. 1212, 68 S. Ct. 972.

The rationale of these decisions is that the Supreme Court of the United States should not be called upon to hear litigation piece-meal. Since compensation in the instant case remains to be resolved, and particularly in view of the history of these litigants, it is entirely conceivable that this Court will be called upon in the future to consider issues arising from the proceedings to determine the amount of just compensation.

Thus, it is submitted that the decision of the Mississippi Supreme Court was not final within the purview of 28 U.S.C. 1257(3). Therefore, the decision of the Supreme Court of Mississippi is not ripe for review by this Court.

IN REBUTTAL

POINT 1.

The resolution of taking conforms to the requirements of due process under both state and federal law.

Basically the argument under Point 1, and which was also made in The Statement of The Case, is that the resolution of taking is jurisdictional in Mississippi, and because the District failed to state in its resolution the detailed and final plans for the uses to which Petitioners' property was to be put, the resolution was defective to the extent that sanction by the Supreme Court of Mississippi below constituted a violation of due process under the Fourteenth Amendment.

An examination of the authorities cited in support of this contention shows that the resolution did not violate Mississippi law or the Mississippi Constitution, much less the Federal Constitution.

First, contrary to Petitioners' contention, Section 2751 of the *Miss. Code of* 1942 *Ann.* (Appendix D to the Petition) does not make the resolution for taking jurisdictional. In fact, this Section does not pertain to the District's legislative determination of necessity at all, but instead is concerned with the application, or pleading, which initiates the eminent domain proceedings in Mississippi. For the purposes of the application all that is required is a statement showing the right and describing the property sought to be condemned. When Section 2751 is construed in connection with Section 2782 of the *Miss. Code of* 1942 *Ann.* (Appendix C to the Petition), which is the statutory proceeding for a writ of prohibition to determine: (1) whether the applicant is entitled to the right; and (2) whether there is a public necessity; it is apparent that the examination of the right pertains to

the legal authority of the applicant to exercise the power of eminent domain and not to the sufficiency of the resolution for taking.

Second, the case of *Ferguson v. Seward*, 146 Miss. 613, 111 So. 596 (1927), simply held that the failure of the board of supervisors to adjudicate the public necessity for the taking of a way for a public road as required by state law was fatal. Here the District clearly determined the necessity for the taking by its resolution, the controversy being whether the resolution sufficiently apprised the land owners of the uses to which their lands would be put and the state court has held affirmatively.

Third, the case of *City of Jackson v. Craft*, 36 So. 2d 149 (Miss. 1948) was not concerned with a resolution for taking or with eminent domain proceedings. There a state statute was enacted authorizing municipalities to acquire land and construct downtown parking facilities for the purpose of relieving traffic congestion. The Act provided that cities could adopt an ordinance declaring that it was necessary for the municipality to operate a parking facility. It provided that notice of the adoption of the ordinance would be published three times specifying a date and place for the hearing of objections, if any. The notice was not required to describe or specify the contemplated location of the parking facility. On the date given in the notice the governing authority of the municipality was to consider the objections, if any, and enter a final order, either rescinding or modifying the ordinance or authorizing the municipality to proceed with the establishment of the facility. The city council adopted the ordinance and did not include a description of the property. Upon challenge, the Supreme Court of Mississippi held that the statute by necessary implication required that the ordinance describe or specify the

contemplated location of the facility and because it failed in this respect the ordinance was void. The reasoning of the court was that unless there was a description of the proposed location somewhere in the ordinance, the citizens would for practical purposes be precluded from appearing and intelligently voicing their objections. The *Craft* case had nothing to do with eminent domain proceedings and has no application to the present factual situation.

Contrary to Petitioners' claim, the action of the District was not afoul of the decision of the Supreme Court of the United States in *City of Cincinnati v. Vester*, 281 U.S. 439, 74 L. Ed. 604, 50 S. Ct. 360, for there it was determined that the condemnation for excess purposes had not been done in accord with the requirements of Ohio law. This is not the situation here for two reasons: first, no excess taking is involved; and second, the Supreme Court of Mississippi has sanctioned the proceedings of the District as being in conformity with the laws of Mississippi. The inapplicability of the *Vester* case in a similar situation was recognized by this Court in *U. S. ex rel Tennessee Valley Authority v. Welch*, 327 U.S. 546, 552, 90 L. Ed. 843, 848, 66 S. Ct. 715.

". . . It is true that this Court did say in Cincinnati v. Vester, 281 US 439, 446, 74 L ed 950, 955, 50 S Ct 360, that 'It is well established that in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one.' But the Court's judgment in that case denied the power to condemn 'excess' property on the ground that the state law had not authorized it. And in Hairston v. Danville & W. R. Co., 208 US 598, 607, 52 L ed 637, 641, 28 S Ct 331, 13 Ann. Cas 1008, this Court, referring to the 'rule' later

stated in the Vester Case, said that "*No case is recalled where this court has condemned as a violation of the Fourteenth Amendment a taking upheld by the State Court as a taking for public uses in conformity with its laws.*' . . . " (Emphasis added)

And it can hardly be argued that the District's failure to be more specific in its resolution is a fundamental deprivation of due process when the resolution conforms in all respects with the general federal condemnation procedures prescribed by Rule 71A of the Federal Rules of Civil Procedure which requires "a short plain statement of the authority for the taking, the use for which the property is to be taken, and a description of the property sufficient for its identification."

POINT 2.

The inclusion of separate tracts in the resolution for taking did not violate due process of law, state or federal.

Petitioners argue here that the resolution of taking violated due process because it included ten tracts of land belonging to four different owners in the same resolution. Cited as authority is Section 2751 of the *Miss. Code of* 1942 *Ann.* Petitioners apparently fail to comprehend that Section 2751 pertains to the application or pleading, which is filed to initiate eminent domain proceedings and not to the resolution of taking, which is simply the entry in the minutes showing the District's legislative determination that the lands are necessary. State law being entirely silent as to the requirements of a resolution for taking, there can be no fundamental deprivation of due process simply because the District's resolution for taking determined simultaneously that the lands of four persons were necessary for the public use

in this multi-purpose project. Particularly when these four persons owned ten contiguous tracts of land comprising in excess of six hundred and thirty acres which were being farmed as a family enterprise prior to and at the time of the trial (R: 467, 484).

Even if the District had included the lands of more than one person in its application for condemnation, which it did not, it is difficult to understand how due process would have been violated since by Rule 71 A(b) of the Federal Rules of Civil Procedure the condemnor is specifically authorized to join in the same action one or more separate pieces of property.

At most, the issues raised under Point 2 constitute nothing more than questions of state law.

POINT 3.

The Act authorizes condemnation for recreational purposes.

Here it is argued that the Pearl River Valley Water Supply District Act does not permit the acquisition of land within the one-quarter mile perimeter for public parks and for recreational purposes by power of eminent domain. The Supreme Court of Mississippi below found that there were three uses for Petitioners' lands, these being control of pollution, control of access to the reservoir and to provide recreation. Arguendo, if the District is not authorized to acquire this land for recreational purposes, it is certainly authorized to acquire it by condemnation for the uses of pollution control and control of access to the reservoir. Therefore, this question is moot. Furthermore, the interpretation of the *Brown* case has become settled law in Mississippi for in the case of *Pearl River Valley Water Supply District v. Mrs. Hazel Wood*, decided February 24, 1964 (Appendix D),

not yet reported, the Supreme Court of Mississippi followed the *Brown* case on a closely analogous set of facts, holding that the District was entitled to acquire land in the one-quarter mile perimeter by condemnation not only for the purposes of access control but for recreational facilities also.

POINT 4

As interpreted by the Supreme Court of Mississippi, the Act authorizes condemnation of dry land for purposes of pollution control.

In Point 4 the Petitioners contend the District had no authority to condemn land for pollution abatement. At most, this argument presents a question of statutory interpretation under state law, which has been resolved in favor of the District by the Supreme Court of Mississippi on three occasions. *Culley v. Pearl River Industrial Commission*, 234 Miss. 783, 108 So. 2d 390 (1959); *Pearl River Valley Water Supply District v. Brown*, 156 So. 2d 572 (Miss. 1963); and *Pearl River Valley Water Supply District v. Mrs. Hazel Wood*, (Miss. 1964). (Appendix D).

POINT 5

The Supreme Court of Mississippi has determined that the lands in controversy are for public and not private uses.

Here it is urged that the proposed condemnation was an attempt to take private property for private use. The Petitioners argue, contrary to the findings of the Supreme Court of Mississippi, that the real reasons for the taking were not for pollution control, access control and for recreational purposes, but rather for the construction of commercial facilities. As recognized in *County of*

Allegheny v. Frank Mashuda Co., 360 U.S. 185, 3 L. Ed. 2d 1163, 79 S. Ct. 1060, in a similar situation this argument presents for decision the purely factual question of whether Petitioners' lands are being sought for private rather than for public use. The Supreme Court of Mississippi has resolved these facts against the Petitioners, thus no federal question is presented.

POINT 6.

The extent of the estate acquired for the relocation of the Natchez Trace Parkway presents a matter of the construction of a state statute and not a federal question.

It is next urged that the taking of 7.6 acres for the relocation of the Natchez Trace Parkway violates the Fourteenth Amendment since the District seeks to condemn the fee for this purpose rather than an easement or right-of-way. This argument presents a question of statutory construction arising under state law and not a federal question.

The controversy arises over the interpretation of Sections 11(f) and 11(g) of the Pearl River Valley Water Supply District Act. Section 11(f) confers upon the District the authority "to acquire by condemnation any and all property of any kind, real, personal or mixed, or any interest therein within the project area not exceeding one-quarter mile from the outside line of the three hundred (300) foot above sea level contour on each side of Pearl River except as provided for rights-of-way under Subsection (g) . . . necessary for the project and the exercise of the powers, rights, privileges and functions conferred upon the District by this Act." In limiting the power of eminent domain thus conferred to "not

exceeding one-quarter mile", the Lesgislature made an exception to that limitation, namely the acquisition of rights-of-way under Section (g). Section (f) continues: "For the purpose of carrying out this Act the right of eminent domain of the District . . . shall be sufficient to enable the acquisition of county roads, state highways or other public property in the project area and the acquisition, or relocation of the above mentioned utility property in the project area; . . . ."

Section 11(g) provides: "It is further provided that the District is hereby authorized to acquire easements or rights-of-way in or outside of the project area for the relocation of such roads, highways, railroads, . . . and to convey the same to the owners thereof in connection with such relocation as a part of the construction of the project. . . ."

Thus, the statute plainly contemplates and provides for the acquisition by condemnation of the fee for relocation of the Natchez Trace Parkway within the one-quarter mile limit and the acquisition by condemnation of easements or rights-of-way for such relocation beyond the one-quarter mile limit.

The Supreme Court of Mississippi below was of the opinion that the interpretation of these sections failed to present any issue since it stated on page 40: "That part of Appellees' land to be used for relocating the Natchez Trace and that part which will be below contour three hundred (300) feet above sea level involved uses so obviously public that discussion thereof is unnecessary."

Again, the argument here presents only a question of statutory construction arising under state law and not a federal issue.

POINT 7:

Whether 6.8 acres will be flooded is a question of fact.

Any statements concerning whether 6.8 acres would be subject to flooding involves a question of fact which this Court is not called upon to review.

POINT 8.

The Act is constitutional when measured against both federal and state concepts of due process.

In Point 8 Petitioners contend that the Pearl River Valley Water Supply District Act is unconstitutional on its face. This charge of invalidity is based primarily on Section 11(f)(3), which authorizes the District to rent, lease or sell land to others for the purpose of operating recreational facilities in connection with the project. In *Culley v. Pearl River Industrial Commission*, supra, the Act was challenged on the same ground as being in violation of the Mississippi Constitution and the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of Mississippi upheld the constitutionality of the Act, saying: (1) it would be presumed that the District would lease and sell lands acquired by condemnation for public purposes; and (2) leases and sales would have to contain restrictions which would insure the public functions of the District, otherwise they would be void. This holding followed *Albritton v. City of Winona*, 181 Miss. 75, 178 So. 799, cited in the *Culley* case.

In *Berman v. Parker*, 348 U.S. 26, 33, 99 L. Ed. 27, 38, 75 S. Ct. 98, cited in *Culley*, the Supreme Court of the United States was called upon to consider a similar grant of authority in the District of Columbia Redevelopment Act of 1945. Section 2 of the Act provided for the acquisition and assembly of real property and the leasing

or sale for redevelopment pursuant to a project area redevelopment plan. The legislative power of Congress was challenged under the Fifth Amendment as depriving the owners of their property without due process since the taking amounted to authorizing the condemnation of private property for private use. The Supreme Court rejected this argument, saying:

> "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end. See Luxton v. North River Bridge Co. 153 U.S. 525, 529, 530, 38 L ed 808, 810, 14 S Ct 891; United States v. Gettysburg Electric R. Co. 160 US 668, 679, 40 L ed 576, 580, 16 S Ct 427. Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. See Luxton v. North River Bridge Co. (US) supra; cf. Highland v. Russell Car & Snow Plow Co., 279 US 253, 73 L ed 688, 49 S Ct 314. The public end may be as well or better served through an agency of private enterprise than through a department of government —or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects . . . ."

The applicability of the *Berman* case is in no way impaired because the challenge was to the Fifth Amend-

ment rather than to the Fourteenth Amendment. In matters of substantive due process the principles applied under the Fifth Amendment are equally applicable to the Fourteenth Amendment. *Carroll v. Greenwich Ins. Co.*, 199 U.S. 501, 50 L. Ed. 246.

The Pearl River Valley Water Supply District Act has been determined by the Mississippi Supreme Court as meeting the requirements of the Constitution of the State of Mississippi, and in view of the principles announced by this Court in the *Welch* and *Berman* cases, the Act is entirely consonant with the due process requirements of the Fourteenth Amendment.

The contention that the application of stare decisis to the pronouncements of the *Culley* case amounts to a violation of due process is without substance or authority. Until such time as fundamental concepts of federal due process in the field of eminent domain or the declared policy of the State of Mississippi change, the Supreme Court of Mississippi is free to consider the *Culley* case as controlling its decisions. There is no authority to the contrary.

CONCLUSION

For the reasons set forth in this Response, it is respectfully submitted that the Petition for a Writ of Certiorari to review the decision of the Supreme Court of the State of Mississippi should be denied.

Respectfully submitted,

L. ARNOLD PYLE
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Of Counsel for Respondent

CERTIFICATE

I, L. Arnold Pyle, the Attorney for the Respondent herein, and a Member of the Bar of the Supreme Court of the United States, do hereby certify that on the 26th day of March, 1964, I served five printed copies of the foregoing Response to the Petition for a Writ of Certiorari to the Supreme Court of the State of Mississippi on the Honorable James P. Coleman, Attorney at Law, Ackerman, Mississippi, Attorney for J. Leland Brown and Mrs. Amie Brown, by United States mail, in a duly addressed envelope, postage prepaid.

L. Arnold Pyle
Attorney for Pearl River Valley
Water Supply District, Respondent

APPENDIX A

THE PEARL RIVER VALLEY WATER SUPPLY DISTRICT ACT

Chapter 197, Laws of Mississippi of 1958
(Pertinent Provisions)

Creation of District

Section 3. *Creation of district, petition.* The Pearl River Industrial Commission, acting through its members who favor bringing the counties they represent into the Pearl River Valley Water Supply District, shall petition the chancery court of the First Judicial District of Hinds County to organize and establish the Pearl River Valley Water Supply District and shall set forth in the petition:

(a) The counties to be included in the Pearl River Valley Water Supply District. Any county through which the Pearl River runs or which borders on the Pearl River may be included in the District.

(b) The fact that a preliminary report or study to determine the engineering feasibility of constructing a dam and reservoir in the basin of Pearl River has been made by a competent engineer or engineering firm and that such study or report shows that the construction of such facilities is feasible for water conservation or supply or for any of the other purposes or services contemplated by the legislative declaration of public policy in this Act.

(c) The necessity and desirability for the construction of such facilities.

(d) A general description of the purposes of the contemplated works, and a general description of the plan

including the lands to be overflowed or otherwise affected thereby, and maps or plats showing the general location of the reservoir and dam and related facilities. The word "project" when used herein shall mean the general plan and purposes of the Pearl River Valley Water Supply District, including its physical properties, as set out in this petition to the Chancery Court and the words "project area" shall mean the physical location of the reservoir, dam and related facilities as shown on the plats filed with the Chancery Court and shall include and be limited to an area of one (1) mile from the shore line of the reservoir at high water. The words "related facilities" as used in this Act shall mean the facilities indicated on said maps or plats filed with the Chancery Court or otherwise explained in the pleadings filed with the Chancery Court and shall include property, land or areas of land, adjacent to, or in the vicinity of, said reservoir or dam and within a distance of one (1) mile from the high water mark of the proposed shore line of said reservoir as shown on said map, which may be acquired, owned, rented, leased or sold by the District in connection with the recreational or industrial development and use of the Project.

The petition shall be filed with as many copies as there are parties defendant. A copy of the preliminary report or study shall be attached to the original and each copy of the petition as an exhibit.

The Board of Water Commissioners shall be made a party defendant, and the Chancery Clerk shall furnish the Board of Water Commissioners with a copy of the petition with attached exhibits. Each county named in the Petition shall be joined as a party defendant by service of process on the president of the Board of Supervisors thereof, and the Chancery Clerk shall furnish a

copy of the petition to each such President. Whenever any municipality having a population according to the most recent Federal Census of ten thousand (10,000) or more is included in such proposed district, such municipality shall be made a party defendant.

It shall not be necessary that any land owners in the counties to be included in said proposed district be named in the petition, or made parties defendant. The chancellor of the chancery court of the First Judicial District of Hinds County, Mississippi, shall have jurisdiction of the entire water supply district and project area for the purposes of this Act. Such jurisdiction may be exercised by the chancellor in term time or in vacation, as provided in this Act.

Proceedings after Petition Filed including Notice

Section 6. *Proceedings after petition filed.* The Board of Water Commissioners shall make a written report on the preliminary study or plans furnished them, and shall within thirty (30) days after receipt of the said study file such report with the Chancery Court setting forth their recommendations concerning the proposed water supply district. After the filing of the report of the Board of Water Commissioners, and upon motion of the petitioners, the chancellor shall enter an order fixing the date for a hearing of the cause on the original petition, the exhibit, the report and recommendations of the Board of Water Commissioners and any answers filed or other pleadings. The chancery clerk shall give notice of such hearing to all persons interested by posting notices thereof at the door of the courthouse of the county or counties in which the district is situated, and in at least ten public places in said proposed district, and also by publishing said

notice at least once a week for three consecutive weeks in a newspaper published in Hinds County and in a newspaper published in each of the other counties proposed to be included in such water supply district. If there is no newspaper published in any such county, then it shall be sufficient to publish said notice in a newspaper having a general circulation in such county. Such notice shall be addressed to the property owners and qualified electors of such proposed district and all other persons interested, shall state when and in what court said petition was and is filed, shall state the counties included in such district, and shall command all such persons to appear before the chancery court, or the chancellor in vacation, at the Chancery Court Building in the First Judicial District of Hinds County, upon the date fixed by the chancellor, to show cause, if any they can, why the proposed water supply district should not be organized and established as prayed for in said petition. The date for such hearing shall not be less than twenty-one (21) days nor more than forty (40) days after the last publication of such notice. It shall be sufficient in describing the lands to be included in the water supply district to name the counties to be included therein in the publication or notice hereinbefore mentioned.

If the court or chancellor finds that the notice or publication was not given as provided for in this Act, it shall not thereby lose jurisdiction, but the court or chancellor shall order due publication or notice to be given and shall continue the hearing until such publication or notice shall be properly given, and the court or chancellor shall thereupon proceed as though publication or notice had been properly given in the first instance.

Powers of District

Section 11. *Powers of District.* The Pearl River Valley Water Supply District through its board of directors is hereby empowered:

(a) To impound overflow water and the surface water of the Pearl River or its tributaries within the project area within or without such district at such place or places and in such amount as may be approved by the Board of Water Commissioners of the State of Mississippi, by the construction of a dam or dams, reservoir or reservoirs, works, plants and any other necessary or useful related facilities contemplated and described as a part of the project within or without the District, to control, store and preserve such waters, and to use, distribute, and sell the same. The Pearl River Valley Water Supply District is also empowered to construct or otherwise acquire within the project area, all works, plants, or other facilities necessary or useful to the project for the purpose of processing such water and transporting it to cities and others for domestic, municipal, commercial, industrial, agricultural and manufacturing purposes and is hereby given the power to control open channels for water delivery purposes.

(b) To acquire and develop any other available water necessary or useful to the project and to construct, acquire, and develop all facilities within the project area deemed necessary or useful with respect thereto.

(c) To prevent or aid in the prevention of damage to person or property from the waters of the Pearl River or any of its tributaries.

(d) To forest and reforest, and to aid in the foresting and reforesting of the project area, and to prevent and to aid in the prevention of soil erosion and floods within

said area; to control, store and preserve within the boundaries of the project area the waters of the Pearl River or any of its tributaries, for irrigation of lands and for prevention of water pollution.

(e) To acquire by purchase, lease, gift or in any other manner (otherwise than by condemnation) and to maintain, use and operate any and all property of any kind, real, personal or mixed, or any interest therein within the project area, within or without the boundaries of the District, necessary for the project and convenient to the exercise of the powers, rights, privileges and functions conferred upon the District by this Act;

(f) To acquire by condemnation any and all property of any kind, real, personal or mixed, or any interest therein, within the project area not exceeding one quarter mile from the outside line of the 300 foot above sea level contour on each side of Pearl River except as provided for rights of way under Subsection (g) of this section, within or without the boundaries of the District necessary for the project and the exercise of the powers, rights, privileges and functions conferred upon the District by this Act, according to the procedure provided by law for the condemnation of lands or other property taken for rights of way or other purposes by railroads, telephone or telegraph companies. For the purposes of carrying out this Act the right of eminent domain of such District shall be superior and dominant to the right of eminent domain of railroad, telegraph, telephone, gas, power and other companies or corporations and shall be sufficient to enable the acquisition of county roads, state highways or other public property in the project area, and the acquisition, or relocation, of the above mentioned utility property in the project area; provided however that Mississippi Highway 43 as presently located shall be kept open as part of

the State Highway system. The cost of right-of-way purchases, re-routing, and/or elevating all other county maintained roads affected by construction of the said reservoir shall be borne by the said water district and new construction shall be of equal quality as in roads existing at the time of passage of this Act.

The amount and character of interest in land, other property and easements thus to be acquired shall be determined by the Board of Directors and their determination shall be conclusive and shall not be subject to attack in the absence of manifold abuse of discretion or fraud on the part of such Board in making such determination. Provided, however,

(1) In acquiring lands, either by negotiation or condemnation, the District shall not acquire minerals or royalties within the project area; sand and gravel shall not be considered as minerals within the meaning of this section; and

(2) No person or persons owning the drilling rights or the right to share in production shall be prevented from exploring, developing or producing oil or gas, with necessary rights of way for inress and egress, pipe lines and other means of transporting such products by reason of the inclusion of such lands or mineral interests within the project area, whether below or above the water line, but any such activities shall be under such reasonable regulations by the Board of Directors as will adequately protect the reservoir, and

(3) In drilling and developing, such persons be and are hereby vested with a special right to have such mineral integrated and their lands developed in such drilling unit or units as the State Oil and Gas Board shall

establish after due consideration of the rights of all of the owners to be included in the drilling unit.

Provided further that where any site or plot of land is to be rented, leased or sold to any person, firm or corporation for the purpose of operating recreational facilities thereon for profit, then the Board shall, by resolution, specify the terms and conditions of such sale, rental or lease, and shall advertise for public bids thereon. When such bids are received, the same shall be publicly opened by the Board, and the Board shall thereupon determine the highest and best bid submitted, and shall immediately notify the former owner of such site or plot of the amount, terms and conditions of such highest and best bid. Such former owner of such site or plot shall have the exclusive right at his option, for a period of thirty (30) days after the determination of the highest and best bid by the Board, to rent, lease or purchase said site or plot of land, by meeting such highest and best bid, and by complying with all terms and conditions of such renting, leasing or sale, as specified by the Board; provided, however, the Board shall not in any event, rent, lease or sell to any former owner more land than was taken from such former owner for the construction of the project, or one-quarter mile of shoreline, whichever shall be the lesser. If such option is not exercised by such former owner within said period of thirty (30) days, then the Board shall accept the highest and best bid submitted.

(g) To require the necessary relocation of roads and highways, and railroad, telephone and telegraph lines and properties, electric power lines, gas pipe lines and mains and facilities in the project area or to require the anchoring or other protection of any of these, provided, due compensation is first paid the owners thereof, or agreement is had with such owners regarding the pay-

ment of the cost of such relocation. It is further provided that the District is hereby authorized to acquire easements or rights of way in or outside of the project area for the relocation of such roads, highways, railroad, telephone and telegraph lines and properties; electric power lines, gas pipe lines and mains and facilities and to convey the same to the owners thereof in connection with such relocation as a part of the construction of the project; provided, however, the directors of the District shall not close any public access road to the reservoir existing prior to the construction of the reservoir unless the Board of Supervisors of the county in which such road is located agrees thereto.

(h) To overflow and inundate any public lands and public property, including sixteenth section lands and in lieu lands within the project area.

(i) To construct, extend, improve, maintain and reconstruct, to cause to be constructed, extended, improved, maintained and reconstructed, and to use and operate, any and all facilities of any kind within the project area necessary or convenient to the project and to the exercise of such powers, rights, privileges and functions;

(j) To sue and be sued in its corporate name;

(k) To adopt, use and alter a corporate seal;

(l) To make by-laws for the management and regulation of its affairs;

(m) To employ engineers, attorneys, and all necessary agents and employees to properly finance, construct, operate and maintain the project and the plants and facilities of the District and carry out the provisions of this Act and to pay reasonable compensation for such services; for all services in connection with the issuance

of bonds as provided in this Act, the attorney's fee shall not exceed one quarter of one per cent (¼ of 1%) of the principal amount of said bonds. For any other services, only reasonable compensation shall be paid for such other services. The board shall have the right to employ a general manager, who shall, at the discretion of the board, have the power to employ and discharge employees. Without limiting the generality of the foregoing, it may employ fiscal agents or advisors in connection with its financing program and in connection with the issuance of its bonds.

(n) To make contracts and to execute instruments necessary or convenient to the exercise of the powers, rights, privileges and functions conferred upon it by this Act;

(o) To make or cause to be made surveys and engineering investigations relating to the project, or related projects, for the information of the District, to facilitate the accomplishment of the purposes for which it is created.

(p) To apply for and accept grants from the United States of America, or from any corporation or agency created or designated by the United States of America, and to ratify and accept applications heretofore or hereafter made by voluntary associations to such agencies for grants to construct, maintain or operate any project or projects which hereafter may be undertaken or contemplated by said District;

(q) To do any and all other acts or things necessary or convenient to the exercising of the powers, rights, privileges or functions conferred upon it by this Act or any other Act of law.

(r) To make such contracts in the issuance of bonds as may be necessary to insure the marketability thereof.

(s) To enter into contracts with municipalities, corporations, districts, public agencies or political subdivisions of any kind and others for any services, facilities or commodities which the project may provide. The District is also authorized to contract with any municipality, corporation or public agency for the rental, leasing, or purchase of, or for the operation of the water production, water filtration or purification, water supply and distributing facilities of such municipality, corporation or public agency upon such consideration as the District and such entity may agree. Any such contract may be upon such terms and for such time as the parties may agree, and it may provide that it shall continue in effect until bonds specified therein and refunding bonds issued in lieu of such bonds are paid. Any such contract with any political subdivision shall be binding upon said political subdivision according to its terms and such municipalities or other political subdivisions shall have the power to enter into such contracts, as in the discretion of the governing authorities thereof would be to the best interest of the people of such municipality or other political subdivision and such contracts may include within the discretion of such governing authorities a pledge of the full faith and credit of such political subdivisions for the performance thereof.

(t) To fix and collect charges and rates for any services, facilities or commodities furnished by it in connection with said project and to impose penalties for failure to pay such charges and rates when due.

(u) To operate and maintain within the project area with the consent of the governing body of any city or town located within the District, any works, plants or facilities of any such city deemed necessary or convenient

to the accomplishment of the purposes for which the district is created.

(v) Subject to the provisions of this Act, from time to time to lease, sell or otherwise dispose of any property of any kind, real, personal or mixed, or any interest therein, within the project area or acquired outside the project area as authorized in this Act, for the purpose of furthering the business of the District.

(w) When in the opinion of the Board of Directors as shown by resolution duly passed, it shall not be necessary to the carrying on of the business of the District that the District own any lands acquired, then the Board shall advertise such lands for sale to the highest and best bidder for cash, and shall receive and publicly open the bids thereon. The Board shall, by resolution, determine the highest and best bid submitted for such land, and shall thereupon notify the former owner, his heirs or devisees, by registered mail, of the land to be sold and the highest and best bid received therefor, and such former owner, or his heirs or devisees, shall have the exclusive right at his or their option for a period of thirty (30) days in which to meet such highest and best bid and to purchase said property.

(x) Any bona fide, resident householder, actually living or maintaining a residence on land taken by the District by condemnation shall have the right to repurchase not exceeding forty (40) acres of his former land or other available land from the Board of Directors for a price not exceeding the price paid for condemning his land.

Parks and Recreation Facilities

Section 13. *Park and recreation facilities.* The Pearl River Valley Water Supply District is authorized to establish or otherwise provide for public parks and recre-

ation facilities, and for the preservation of fish and wildlife, and to acquire land otherwise than by condemnation except as provided in Section 11 (f) for such purposes, within the project area.

Rules and Regulations

Section 14. *Rules and Regulations.* (a) The Board of Directors of the District shall have the power to adopt and promulgate all reasonable regulations to secure, maintain and preserve the sanitary condition of all water in and to flow into any reservoir owned by the District, to prevent waste of water or the unauthorized use thereof, and to regulate residence, hunting, fishing, boating, and camping, and all recreational and business privileges, along or around any such reservoir or any body of land or easement owned by the District.

(b) Such District may prescribe reasonable penalties for the breach of any regulation of the District.

APPENDIX B

OPINION OF TRIAL COURT IN THE CIRCUIT COURT OF MADISON COUNTY

No. 663

PEARL RIVER VALLEY
WATER SUPPLY DISTRICT

vs.

J. LELAND BROWN, ET AL

OPINION

On June 13, 1962 the Pearl River Valley Water Supply District filed an application for the action of eminent domain, seeking to condemn 34.3 acres belonging to Mr. and Mrs. J. Leland Brown, husband and wife. On June 29, 1962 Mr. and Mrs. Brown filed a petition in this Court for a writ of prohibition to prevent the condemnation of said parcel of land.

The land involved is the homestead of Mr. and Mrs. Brown. The Act states that such persons "*Shall* have the right to repurchase not exceeding 40 acres of his former land or other available land." This section contemplates the taking but turns right around and says that such resident shall have the right to re-purchase. This is confusing. But due to the fact that the provision is in the statute it is my opinion that public necessity should be clearly and without doubt shown before a person's homestead may be taken.

We must view the situation as it existed on April 6, 1962, the date of the resolution declaring the necessity for the condemnation of the lands of Floyd T. Brown and others.

Therefore, it is my opinion that on that date the evidence shows as follows:

1. That 7.4 acres of the 34.3 acres are below the three hundred feet above sea level contour and may be subject to inundation from time to time. The public necessity is shown for the taking of this parcel.

2. The evidence shows that 7.6 acres of the 34.3 acres are needed for the relocation of the Natchez Trace. It is my opinion that there is authority for the taking for such a purpose and that there is a public necessity for so doing.

3. It is my opinion that on April 6, 1962 that there was no public necessity for the taking of the remainder, to wit, 19.3 acres of the 34.3 acres.

An order may be taken setting aside the injunction as to 7.4 acres which may be subject to inundation and 7.6 acres for the relocation of the Natchez Trace. The injunction is made perm[illegible] as to the remainder, to wit, 19.3 acres.

This the 28th day of February, 1963.

LEON F. HENDRICK
CIRCUIT JUDGE

APPENDIX C

ASSIGNMENTS OF ERROR TO THE SUPREME COURT OF MISSISSIPPI

ASSIGNMENT OF ERRORS

Comes now Appellant, Pearl River Valley Water Supply District, and submits this, its Assignment of Errors, and would show unto the Supreme Court of the State of Mississippi that the Circuit Court of Madison County, Mississippi committed reversible error in the trial of this case and in entering its Order prohibiting the condemnation of a portion of the lands in question for the following reasons, to-wit:

1. The Lower Court erred in making permanent in part the temporary Writ of Prohibition, thereby preventing the condemnation of 19.9 acres of the lands in question.

2. The Lower Court erred in permitting the witness Murray, a member of the Board of Directors, to express his opinions as to the necessity for the taking.

3. The Lower Court erred in not sustaining Appellant's motion to exclude the evidence of Appellees and to find for the Appellant.

CROSS ASSIGNMENT OF ERRORS

Come now the appellees, J. Leland Brown and Mrs. Annie Brown, and respectfully submit this, their cross assignment of errors, constituting a reversible error by the Circuit Court of Madison County, Mississippi, in the trial of this case and in entering its order dissolving the temporary writ of prohibition prohibiting the condemnation of a portion of appellees' lands and assign the following reason, to-wit:

I.

The trial court erred in denying appellees' motion to strike the bill of particulars and in failing to sustain appellees' motion requiring appellant to particularize as to the use or uses of the lands in question.

II.

The trial court erred in sustaining appellant's objections to request that members of the Board of Directors of the appellant be placed upon the stand as adverse witnesses.

III.

The trial court erred in overruling appellees' motion for permanent writ of prohibition.

IV.

The trial court erred in overruling appellees' motion to dismiss allegations as to acquisition of property for Natchez Trace.

V.

The trial court erred in dissolving the temporary writ of prohibition theretofore granted as to 14.4 acres of appellees' land.

VI.

The trial court erred in permitting evidence offered by the appellant and objected to by appellee.

VII.

The trial court erred in sustaining the objection to evidence offered by the appellees and objected to by appellant.

APPENDIX D

CASE DECIDED BY SUPREME COURT OF MISSISSIPPI

ON FEBRUARY 24, 1964

IN THE SUPREME COURT OF MISSISSIPPI

No. 42,992

PEARL RIVER VALLEY WATER SUPPLY DISTRICT, APPELLANT AND CROSS-APPELLEE

vs.

MRS. HAZEL A. WOOD, APPELLEE and CROSS-APPELLANT

PATTERSON, JUSTICE:

The Pearl River Valley Water Supply District, appellant and cross-appellee here, filed suit to condemn 113 acres of land in Madison County owned by appellee and cross-appellant, Mrs. Hazel A. Wood. The land was sought by the District for the purposes hereinafter mentioned in connection with the construction and development of a reservoir and related facilities in accordance with authority granted the District by Chapter 197, Laws of 1958. Mrs. Hazel A. Wood, the owner, was made defendant in the eminent domain suit. Hereinafter the Pearl River Valley Water Supply District will be referred to as the District and Mrs. Hazel A. Wood will be referred to as the owner.

Before the condemnation suit was tried the owner filed in circuit court a petition for a writ of prohibition. In this petition reference was made to the eminent domain suit then pending appertaining to these lands. A temporary writ of prohibition was issued pending a hearing

on the merits. Of the 113 acres originally sought by the District, 31.7 acres was for conveyance to the Department of Interior for the relocation of the Natchez Trace Parkway. Prior to the trial on the merits an agreed order was entered dismissing from litigation this 31.7 acres of the original 113 acres, leaving in controversy 82.1 acres. At the conclusion of the trial the circuit court, in a written opinion, found the north 42.1 acres of the 82.1 acre tract was needed by the District in order to have access by water underneath the relocated Natchez Trace for the purpose of establishing a marina or boat landing and to provide certain related facilities in connection therewith. Of this one-half, he found that 1.9 acres was below the 296 foot contour line and 5.6 acres was below the 300 foot contour line. He further found the remaining acreage was on high ground upon which was located the owner's home, the court specifically finding that there was no public necessity for the taking of this 40 acres of land upon which she resided.

In accordance with the court's opinion, an order was entered denying the writ of prohibition as to the 42.1 acres of land but making such writ permanent as to the 40 acres upon which the owner resided. From this opinion the District appeals as to the 40 acre tract and the owner cross-appeals as to the 42.1 acre tract.

The minutes of the Board of Directors of the District proclaiming the necessity for the condemnation of appellee's land was made an exhibit to the application in the eminent domain suit and was set forth in the answer to the petition for a writ of prohibition, being as follows:

"WHEREAS, this Board does now find and determine that a substantial portion of the lands hereinafter described as Parcel No. 651 is required by the United

States of America, through its agency, the United States Park Service, for relocation of the Natchez Trace Parkway, necessitated by the construction of the Pearl River Reservoir, and that the remaining portion of said Parcel 651, all of which is located within the one-quarter mile from the outside line of the 300 foot above sea level contour on each side of Pearl River with other adjoining lands on the land side of the Natchez Trace Parkway, furnishes the only means of ingress and egress to and from the Reservoir in the approximate seven miles distance between Highway No. 43 and Greshams Bay; that said remaining portion of Parcel No. 651 will be connected with the main Reservoir by a boat passage structure under the Trace; that because of the location and needs of the Natchez Trace Parkway, suitable land available for access to the Reservoir in this area is very limited; that said portion of Parcel No. 651 is required to provide access facilities and accommodations for boating and fishing activities by the public, for use in connection with the harbor and marina development for the control of the Reservoir and the protection of its water from pollution and such other uses as are authorized by law as specified herein and to the extent applicable to these lands specified in said Resolution of this Board captioned 'General Policies of Land Acquisition'."

The lands here in controversy are located on the west side of the 30,000 acre reservoir approximately four miles south of the intersection of Highway 43 and the Natchez Trace Parkway and approximately six miles north of the reservoir dam to the south. The entire tract lies west of the present Natchez Trace Parkway and will lie west of the Parkway upon its being relocated. On the west side of the reservoir between the lake and the dam, there are only about 753 acres for public use in connection with

this reservoir. In the northern portion of the owner's property there is a creek which runs under the Natchez Trace. When the reservoir is flooded, this creek will become a cove or bay which the District plans to develop as a boat harbor with supporting facilities. This cove and boat harbor present the only place for access to the reservoir between Highway 43 and Gresham's Bay to the south, a distance of six or seven miles. The plans for the relocated Parkway provide for a bridge at this point with sufficient clearance to permit the passage of boats from the cove on the west side of the Parkway to the lake proper. The supporting facilities for the harbor will include picnic areas, trailer parks, space for tent camps and automobile parking spaces.

Due to scarcity of land on the east side of the Parkway, the District is seeking to acquire an additional 750 acres on the west or land side of the Parkway in the immediate vicinity of the four creeks or coves which pass under the Parkway. This 750 acres breaks down as follows: Beginning at the dam and proceeding north there are 162 acres in the vicinity of Walker Cove; 300 acres in the vicinity of Gresham's Cove; 270 acres in the vicinity of the Hazel Wood Cove, and north of Highway 43 in the vicinity of Williams Bay there is an additional 92 acres. These lands lie within one-quarter of a mile of the outside of the 300 foot contour line.

The owner sharply contends this one-quarter of a mile strip from the outside of the 300 foot contour line does not apply to the small creek or tributary which crosses the northern end of the property here in question, since this is a tributary of the river and not the river itself; and, this being true, it was not authorized by Sec. 5956-61 of the Miss. Code of 1942, Rec., nor was it the intent of the legislature in this Act to include tributaries. The

record reflects the present Natchez Trace Parkway is above the 300 foot contour line at this point, but that such line extends through and beyond a culvert under the Parkway.

The record discloses without doubt that the owner does reside upon the 40 acre tract to which the writ of prohibition was made permanent.

A county road presently intersects the southern extremity of the owner's property from the district's property to the south. Another county road extends from Highway 43 southward through the District's land to the north of the owner's property. The plans of the District are to extend the county road which lies to the south in a northerly direction, crossing the creek or bay, and on into the land owned by the District to the north, thence connecting with the entire existing county road system. The road system made possible by the acquisition of this land will roughly parallel the Parkway northward from the dam to Highway 43, and will provide access to the other reservoir properties from both north and south, as well as giving access to the coves between such highway and the dam, these coves, in turn, giving access by water to the lake proper.

Without the development of the cove on this land, the adjacent lands to the immediate north and south of the property here in litigation will afford no access to the lake by either automobile or boat, the District's ownership on the lake side of the Parkway in this area being limited to a ten-foot strip between contour 298 and the Natchez Trace Parkway. Such strip is available to the District only for maintenance and control of the shoreline and cannot be used in connection with the related facilities of the boat marina and harbor. For all practical

purposes, therefore, the western boundary of the reservoir at this location will be the Natchez Trace Parkway, over which the District has no control.

The projected statistics as to the usage, facilities needed, etc., are related in detail in the case of Pearl River Valley Water Supply District v. Brown, 156 So. 2d 572. They are applicable here and will not be repeated for brevity. The testimony further shows that final plans for use of these lands could not be made until the District determined with finality what lands it would have available to fit for the overall purposes of the reservoir.

The questions presented for the Courts to determine by the appeal and cross-appeal are: (1) Is the District required in proceedings for a writ of prohibition to prove that the land of a residential householder is absolutely necessary for the purposes of the reservoir project, and, (2) does the acquisition of land for access to the reservoir, control of the shoreline, pollution control of the reservoir waters, and the construction of recreational facilities such as boat harbors and supporting facilities, constitute uses which are public, and (3) is the District required to have definite and complete plans for roads and other developments which are to be placed on the land site?

The primary question presented on cross-appeal, the other questions raised thereby being so closely related to the former questions hereinabove set forth that there is no necessity to here outline them, is whether the trial court erred in allowing the appellant to put on testimony with reference to the 42.1 acre tract of the owner which was shown to be acquired by measuring outward from the 300 foot above sea level contour line which ran through the culvert under the Parkway and up the thread

of a small intermittent stream that flows into Pearl River, and was not, therefore, within a quarter of a mile of the 300 foot contour line of the river proper. In derogation it is charged of Sec. 17 of the Mississippi Constitution and the Fourteenth Amendment to the Constitutions of the United States.

The Court will address itself to the last question first, as it is apparent that if the District had no authority to take from the 300 foot contour line outward a distance of one-quarter of a mile from the creek or tributary, then the other questions would not come into being over a large portion of the 42.1 acre tract. The testimony of the engineers both for the owner and the District showed the 300 foot contour line to be correctly depicted upon the exhibits introduced. The testimony further shows that such line was correctly established beneath and beyond the Natchez Trace Parkway even though the same ran beneath and through this Parkway via a culvert. One of the engineers testified that this contour line is nothing more than a present location of the water line of the reservoir when it is filled to a level of 300 feet above sea. This water will, of course, seek its own level and in so doing will obviously flow through the culvert beneath the Natchez Trace Parkway and up the thread of the intermittent stream. This line will be smooth and symetrical only if the terrain is smooth and symetrical. It will be irregular and uneven if the terrain varies. The cross-appellant's contention that the line should be symetrical is not well taken for the obvious reason that a contour line is not subject to movement or variation according to the whim or desire of a landowner or engineer, but rather is an actual measurement of the distance between a particular place and sea level. It is, therefore, the Court's opinion that the contour line is properly

established along this tributary and that the District had the right to take outward therefrom a distance of one-quarter of a mile, and that such taking does not violence to Section 5956-61, or the legislative intent by so doing.

Section 5956-61(f), Miss. Code of 1942, Rec., is as follows: "To acquire by condemnation any and all property of any kind, real, personal or mixed, or any interest therein, within the project area not exceeding one-quarter mile from the outside line of the 300 foot above sea level contour on each side of Pearl River except as provided for rights of way under Subsection (g) of this section, within or without the boundaries of the District necessary for the project and the exercise of the powers, rights, privileges and functions conferred upon the District by this Act, according to the procedure provided by law for the condemnation of lands or other property taken for right of way or other purposes by railroads, telephone or telegraph companies. . . ."

The owner cites no case in law or argument in logic to the contrary.

The first question on direct appeal for our decision is whether the District is required in a proceeding for a writ of prohibition to prove the land of a residential householder is absolutely necessary for the purposes of the reservoir project before it can be condemned. Pearl River Valley Water Supply District v. Brown, supra, is directly in point here and decisive of this issue. It is therein stated clearly and without equivocation that the question of public use is always a judicial question and that public necessity for a taking is essentially a legislative question. The burden of proof is on the landowner who seeks to show lack of necessity, the rule being as to whether the taking is necessary is within the discretion of the con-

demnor and the courts will interfere with the exercise of such discretion only when abuse of discretion or fraud is shown. The record here, as there, is devoid of any proof or showing of any kind that the District abused its discretion in seeking to condemn the owner's land. No fraud, actual or legal, is shown or implied by cross-appellant. The trial court erred as a matter of law in requiring the appellant to show the land is absolutely necessary for the purposes of the project, it being the land of a resident householder.

This error apparently arose because the circuit judge erroneously applied the homestead provisions of the act as requiring public necessity to be shown clearly and without a doubt. See *District v. Brown*, supra, which the trial court did not have before it as it was not at that time decided. We hold, therefore, that the lower court erred in this regard.

The second question for decision on direct appeal is: Does the acquisition of land for (a) access to the reservoir, (b) control of the shoreline, (c) pollution control of the reservoir waters, and (d) the construction of recreational facilities such as boat harbors and supporting facilities constitute uses which are public?

Again this question has been decided under similar facts in *District v. Brown*, supra, wherein it is stated: "As far as appellee's land is concerned, there are three primary public uses, control of pollution, control of access to the reservoir, and to provide recreation. All of these uses pertain to the reservoir and to contend that these uses are not public is to contend that the reservoir itself is not a public use of the lands covered thereby."

Appellee and cross-appellant contends heartily that this does not apply here for the reason the Natchez Trace

Parkway lies between the lands herein sought to be condemned and the reservoir itself and that for this reason the question of pollution does not here come into being. Assuming, but not deciding, this to be true, there remain two primary public uses—control of access to the reservoir and provision for recreational facilities—which are so closely related to the reservoir in its entirety that this Court is constrained to hold in view of *Brown* that the uses herein question are public.

The third question for our decision on both appeals is whether the District is required to have definite and complete plans for roads and other developments which are to be placed thereon before eminent domain proceedings can be successfully instituted. Once again this is controlled by *Brown*, and is answered in the negative. The resolution is copied in another part of this opinion. It indicates the uses to be made of the owner's land, but neither the resolution nor the proof show any final plans specifically indicating what use is to be made of any particular part thereof. In accord with the cited case, we are of the opinion that appellee's argument is not well taken. The proof indicates that all of said land will be used for control of access to the reservoir and to provide public recreation. As heretofore stated, this alone is sufficient to meet the requirements of the law on the question of public use. In addition, the parking spaces, campsites, parks and other such facilities are also for public use. "It is unreasonable and unnecessary to require the condemnor for such public uses to include in the resolution and show by proof final plans for every part of the land taken. Such a rigid requirement would imply that no changes could ever be made in the various public uses as time and circumstances might require. It would also imply that no change in plans or use could ever be made

So long as public use is shown, detail plans are not required." *Brown*, supra.

We are of the opinion, and so hold, there exists no legal or factual basis for the issuance of a writ of prohibition in this case. On direct appeal, the case is reversed, the writ of prohibition is dissolved, and judgment is entered here dismissing the petition. The case is affirmed on cross-appeal.

REVERSED ON DIRECT APPEAL; WRIT OF PROHIBITION DISSOLVED; AFFIRMED ON CROSS-APPEAL.

KYLE, P.J., AND ETHRIDGE, GILLESPIE AND BRADY, JJ, CONCUR.